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No. 89-65

In the Supreme Court of the United States

OCTOBER TERM, 1989

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
FORT STEWART ASSOCIATION OF EDUCATORS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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1. Title VII of the CSRA requires negotiation over "conditions of employment" (5 U.S.C. 7102(2)), which the statute defines as "personnel policies, practices, and matters • • • affecting working conditions" (5 U.S.C. 7103(a)(14)). In our opening brief (at 17), we began our discussion of the first question presented—whether employee compensation is a required subject of negotiation—by stating that "[e]xamined in isolation," the most natural reading of this statutory language refers not to matters such as compensation but to "the physical conditions under which an employee labors." We supported that statement by noting the conclusion of the District of Columbia Circuit that "[t]he term 'working conditions'

ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job" (*Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 990 (1988), reh'g en banc granted, No. 87-1733 (Feb. 6, 1989)), and the observation of Justice Stewart that the phrase "conditions of employment" is most naturally read to encompass "the various physical dimensions" of an employee's "working environment" (*Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 222 (1964) (concurring opinion)). See also *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 202 (1974) (the phrase "working conditions" has a "specific meaning in the language of industrial relations," encompassing " 'surroundings' and 'hazards' ").

In their argument on the first question presented, respondents focus their attack on a serious distortion of our position. The Fort Stewart Association of Educators (Association) states, for example, that it is "specious to argue, as petitioner has, that negotiations over 'working conditions' are limited to the physical conditions under which an employee labors." Br. 11; see also FLRA Br. 19-20; AFL-CIO Amicus Br. 3; NTEU Amicus Br. 7. We never made such an argument. Like Justice Stewart, we recognize that the phrase " 'conditions of employment' is no doubt susceptible of diverse interpretations," that the phrase has been extended beyond the purely physical conditions of the workplace, and that "[a]t the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment." *Fibreboard*, 379 U.S. at 221-222 (concurring opinion). Our point—which respondents ignore—is that one would not normally think, upon reading the words of the statute, that by making "conditions of employment"

negotiable Congress had extended the bargaining obligation to include compensation.[1] Thus, it becomes necessary to consider the context of the statute in question, as well as the approach Congress has followed in analogous legislation.

A comparison of the language of Title VII of the CSRA with the language of other statutes mandating collective bargaining confirms the correctness of the initial impression drawn from the statutory language. Congress has *never* made compensation negotiable by using the phrase "conditions of employment." In both the NLRA and the Postal Reorganization Act, for example, it specifically made "wages" negotiable.[2] Moreover, in those statutes it

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[1] The FLRA makes two erroneous arguments concerning the language of Section 7103(a)(14). First, it argues (Br. 19 & n.8) that the phrase "affecting working conditions" modifies "matters" but not "personnel policies" and "practices," so that all "personnel policies" and "practices," but only "matters • • • affecting working conditions," are negotiable. That seems an odd way to read the phrase "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." That is especially so since, under the FLRA's reading, the word "practices" would have *no* limiting reference. Moreover, the provision continues by stating that the phrase "conditions of employment" does not include "policies, practices, and matters" in three circumstances, and it is clear that the exceptions relate to "policies" and "practices" as well as to "matters."

The FLRA also contends (Br. 19-20) that the exception in Section 7103(a)(14) for policies, practices, and matters "specifically provided for by Federal statute" would not have been needed unless compensation were a policy, practice, or matter. But the exception is not rendered redundant by our reading of the statute. The exception provides that a statute governing the subject renders *any* matter nonnegotiable, even matters—like safety conditions—that are indisputably conditions of employment.

[2] Respondents and their amici cite other statutes where, in their view, Congress included compensation within the phrase "conditions of employment." For example, the AFL-CIO notes (Br. 9) that the

also made "conditions of employment" or "working conditions" negotiable, indicating that it does not assume such phrases to include compensation.[3]

Respondents have very little to say about the Postal Reorganization Act, even though, like the statute at issue, it governs federal employees. Indeed, the FLRA, the Association, and the NTEU all fail even to cite the statute. There is little that they can say about its language, which makes "wages, hours, and working conditions" negotiable (39 U.S.C. 1201 note); the AFL-CIO merely argues that Congress forgot to insert the word "other" into the statute (Br. 9). That response is especially unconvincing since one of the authors of the bill later enacted as Title VII of the CSRA contrasted the negotiability provision of the bill with that of the Postal Reorganization Act. He stressed that the bill would "not permit bargaining over pay and fringe benefits," adding that those were "the kinds of things that are giving us difficulty in the Postal Service

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section describing the purposes of the Norris-LaGuardia Act states that employees should be free to negotiate over "the terms and conditions of [their] employment." But like the other statutes on which respondents rely, the Norris-LaGuardia Act, which limits the power of courts to issue injunctions affecting labor disputes, does not authorize or mandate collective bargaining. It is the NLRA that governs bargaining in the private sector, and it specifically authorizes bargaining over "wages." 29 U.S.C. 158(d).

[3] Respondents rely on a 1961 Task Force Report suggesting that "[s]pecific areas that might be included among subjects for • • • collective negotiations include the work environment, • • • and where permitted by law the implementation of policies relative to rates of pay." FLRA Br. 24 n.13; Association Br. 12-13. The main lesson to be drawn from that proposal, in our view, is that the Task Force, in suggesting that compensation *might* be made negotiable under certain circumstances, clearly distinguished between "the work environment" and "rates of pay."

today." 124 Cong. Rec. 25,716, 29,182 (1978) (statements of Rep. Udall).[4]

Respondents rely heavily on two decisions of the FLRA's predecessor, the FLRC, which allowed wage bargaining in limited circumstances. The FLRA concedes, however, that there is nothing to indicate that Congress was aware of those decisions. Br. 26 n.16. Moreover, as the Association acknowledges (Br. 18), Congress thought that, under current practice at the time the CSRA was under consideration, "Federal employees may not bargain over pay or fringe benefits." 124 Cong. Rec. 27,549 (1978) (statement of Sen. Sasser). The Association contends that Congress was "mistaken[]" (Br. 18), and that it intended to continue the prior practice reflected in the two FLRC decisions even though it understood the prior practice to prohibit negotiation over compensation. In our view, Congress cannot have intended to continue a practice it knew nothing of; instead this Court should read the limiting statutory language in light of the numerous statements in the legislative history that compensation is not negotiable. See, *e.g.*, S. Rep. No. 969, 95th Cong., 2d Sess. 13 (1978); H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12, 377, 390 (1978); 124 Cong. Rec. 25,716, 29,182

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[4] The FLRA argues (Br. 29) that other supporters of the bill "stated in floor debate that Section 7103(a)(14)(C) of the Statute would remove only matters 'specifically' provided for by statute so that where, as in the instant case, the agency has discretion over a matter, Section 7103(a)(14)(C) would not preclude bargaining." To be sure, many congressmen noted that the statute precluded bargaining over matters specifically provided for by statute. However, contrary to the implication of the FLRA's argument, no congressman said at any point during the debate that employees like the teachers in this case would be able to bargain over pay.

(statements of Rep. Udall), 24,286, 25,720 (statements of Rep. Clay).[3]

Since any proposal that is negotiable under Title VII of the CSRA may be imposed on a federal agency by the Federal Services Impasses Panel (5 U.S.C. 7119(c)(5)(B)(iii)), Congress would surely have made clear that wage bargaining was permitted if that was intended. Although the NTEU fails to appreciate this point (Amicus Br. 20 n.3), we think it obvious that Congress would not sub silentio decide to remove wage scales from agency responsibility and accountability by authorizing an arbitration panel to set federal employees' wages.

2. The second question presented is whether the proposals at issue—particularly the proposal calling for a 13.5% salary increase—are contrary to the management rights provision of Title VII of the CSRA, which provides that nothing in the statute shall "affect the authority of any management official of any agency—(1) to determine the • • • budget • • • of the agency." 5 U.S.C. 7106(a). The Association argues (Br. 23) that if Congress did not bar negotiation over compensation, "it would not have intended a construction of the budget rights clause in § 7106(a)(1) that would foreclose such bargaining." We

[3] The AFL-CIO discounts (Amicus Br. 16-17) the fact that Congress specifically rejected a proposal by Representative Heftel that would have allowed bargaining where a matter was not specifically controlled by statute. It hypothesizes that Congress did not want to enumerate bargainable matters. We agree with the D.C. Circuit that the rejection of Representative Heftel's proposed amendment is "a fact of no little interpretive significance." *Department of Defense Dependents Schools*, 863 F.2d at 992. At the least, Representative Heftel's proposal alerted Congress to the fact that the compensation of some federal employees was not set by the General Schedule or another very specific provision. Yet Congress rejected that proposal and took no action to show that it wanted to allow wage bargaining in that situation.

agree that the first two questions presented by this case are interrelated; but, in our view, the fact that Congress gave control over the budget to agency management *reinforces* the conclusion that it did not intend to open compensation, one of the largest items in most agency budgets, to negotiation and binding arbitration.

The Association (Br. 25-26) and the AFL-CIO (Amicus Br. 21-22) endorse the court of appeals' conclusion (Pet. App. 20a) that the proposals here are negotiable because they are not significant when compared to the Army's budget as a whole. The FLRA disowns that approach, noting that "[t]he Authority in its decision did not refer to the proposals' cost in relation to the overall Army budget" and that in a prior case "the Authority assessed the significance of a proposal's cost in relation to the school's budget." Br. 36 & n.26. We agree with the FLRA's view in that prior case: the significance of a proposal should be tested against the program budget rather than the agency budget as a whole. Otherwise, as stated in our opening brief (at 29-30), the cost of any proposal with respect to programs like this one would not be significant. Congress did not intend the budget clause of the management rights provision to have so little meaning.

The FLRA's present approach, while properly rejecting the court of appeals' rationale, contains significant defects of its own. The Authority believes that "[m]ere cost of a proposal alone is an insufficient basis to find interference with the Statute's budget right." Br. 15. It further claims that "[m]anagement's determination of its budget is, of course, functionally distinct from management's determination to incur costs, as even the Schools recognize." Br. 37. To the contrary, we do not see any such distinction. It seems evident that any proposal that would require an agency to incur significant costs—such as a proposal to increase teachers' salaries by 13.5%—would interfere with

its right to determine its budget. Indeed, we believe that opening an item such as teachers' salaries to bargaining necessarily interferes with the budget right. As the FLRA states (Br. 35), teachers' salaries are typically by far the largest item in any school budget. Accordingly, that item must be off limits in collective bargaining if dependents schools are to have control of their budgets.

The FLRA further contends that Fort Stewart failed to meet its burden—which the Authority contends is "reasonably placed on the agency employer"—of proving that the benefits that might follow from a 13.5% salary increase would not compensate for the increase in costs. Br. 38. In our view, such a burden cannot "reasonably" be placed on the employer. As the Fourth Circuit explained, "the FLRA's test makes itself, not the agency, the arbiter of the agency's budget," even though Congress reserved the budget right to agency management. *Nuclear Regulatory Commission* v. *FLRA*, 879 F.2d 1225, 1233 (1989) (en banc), petitions for cert. pending, Nos. 89-198 and 89-562. Moreover, the FLRA is asking the federal employing agencies to do the job of the unions. If it were reasonable to allow the FLRA to decide whether the benefits of a proposal outweigh its costs, then the unions should at least be required to bear the burden of showing what the compensating benefits would be in a particular case. The proposal, after all, is their idea. It is surely not surprising, as the FLRA acknowledges (Br. 38 n.28), that no agency has ever undertaken to prove the benefits that would flow from acceptance of a union proposal.

3. The dependents schools' statute, 20 U.S.C. 241, requires that the education provided at the domestic dependents schools be comparable to the education provided at public schools in the State (Section 241(a)) and, "[t]o the maximum extent practicable," be furnished at a cost per pupil not exceeding that in comparable communities in the

State (Section 241(e)). In a regulation implementing the statute, the Army has provided that salary schedules at the dependents schools are to be comparable to those at local public schools. Army Reg. 352-3, 1-7(h) (1980). On the third question presented in this case, the FLRA disagrees with the Army's view that there is a "compelling need" for this regulation. The FLRA reads Section 241 as merely precatory because it requires comparability only to the maximum extent practicable; the Authority contends that such a law "can hardly be said to issue a mandate." Br. 43 n.31.[6] In our view, that is a fundamental error. A statutory directive must be respected, even when it allows an agency some flexibility. *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409, 1415 (3d Cir. 1988).[7]

Like the court of appeals (Pet. App. 18a), the FLRA (Br. 43-44) suggests that there is, in any event, no compelling need for the regulation because Fort Stewart could maintain per pupil cost comparability by "deemphasizing equipment." As stated in our opening brief (Br. 34-35), that is no answer at all. A school without books, or com-

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[6] The FLRA's interpretation of Section 241, which is not part of Title VII of the CSRA, is not entitled to deference. *Fort Knox Dependent Schools* v. *FLRA*, 875 F.2d 1179, 1181 (6th Cir. 1989); *West Point Elementary School Teachers Ass'n* v. *FLRA*, 855 F.2d 936, 940 (2d Cir. 1988); Pet. App. 13a.

[7] The Association argues (Br. 43-44) that per pupil costs at Fort Stewart will not be identical to those at the local public schools, even if salary schedules are equal. As it suggests, it would be impracticable, if not impossible, for Fort Stewart to match the local public schools' payroll costs exactly; that would require, for example, teaching staffs that corresponded in experience and professional training. That is why Congress mandated equality to the maximum extent practicable. But the impracticability of exact cost equality is no reason to ignore Congress's direction.

puters, or chemistry laboratories is not comparable to one with such equipment merely because its teachers are paid more. See *Fort Knox Dependents Schools* v. *FLRA*, 875 F.2d 1179, 1182 (6th Cir. 1989).[8]

The NTEU contends (Amicus Br. 27) that the negotiability of the proposals here is supported by the two FLRC cases authorizing bargaining over wages prior to the enactment of Title VII of the CSRA. The respondents make no such contention, presumably because of the sharp contrast between the proposals in the FLRC cases and the proposals in this case. In *Overseas Education Ass'n, Inc. and Department of Defense, Office of Dependents Schools*, 6 F.L.R.C. 231, 231 (1978), and *United Federation of College Teachers and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211, 212 (1972), the proposals sought to implement statutory commands comparable to that in Section 241. In *United Federation of College Teachers,* for example, the teachers' union proposed salary increases that would have made the pay of teachers at the Merchant Marine Academy comparable to that of the Naval Academy, as the governing statute required. 1 F.L.R.C. at 212. The Association makes no comparable proposal here. Indeed, while acknowledging that per pupil costs at Fort

[8] The FLRA suggests (Br. 44) that there is considerable room for "deemphasizing equipment." It relies upon 1988 budget figures for all of the dependents schools, including those located in foreign countries (which have more students than those in this country and are governed by a separate statute, 20 U.S.C. 902), which showed that compensation accounted for about half of costs at the schools. In fact, we have been informed that compensation accounts for a much higher percentage of the budget at the domestic dependents schools. But, even if the figure were "only" 50%, it would be clear (a) that no item in the budget exceeded compensation and (b) that any significant increase in compensation would require substantial cutbacks elsewhere.

Stewart already exceed those at local public schools (Br. 42-43), the Association seeks to increase that disparity.

Both respondents rely heavily on the language in Section 241(a) relating to the dependents schools located in the Territories. FLRA Br. 44-46; Association Br. 29-31. This reliance, however, simply underscores respondents' failure to read Section 241 as a whole, including subsection (e). As stated in our opening brief (Br. 35-36 n.25), the cost of living in the Territories differs from the cost of living in the 50 States. Accordingly, Congress's mandate with respect to costs at the schools in the Territories differs from its mandate in Section 241(e) with respect to the domestic dependent schools. While Section 241(e) provides that per pupil costs at the *domestic* dependents schools should "not exceed the per pupil cost of free public education provided for children in comparable communities in the State," it provides that per pupil costs at the schools in the *Territories* should not exceed the amount determined "to be necessary to provide education comparable to the free public education provided for children in the District of Columbia." Since there is no mandate in Section 241(e) that per pupil costs in the Territories be comparable to per pupil costs in the District, but only a mandate that the education provided be comparable, Congress provided in Section 241(a) that teachers' salaries in the Territories should be set by comparison with those in the District. There was no need to do so with respect to the domestic dependent schools because Section 241(e) itself directs that per pupil costs at those schools be maintained as closely as practicable to those at the local public schools.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1989

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* The Solicitor General is disqualified in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—282-203/00692